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No. 177.

In the

Supreme Court of the United States

October Term, 1951.

JOHN F. HARTMAIER, ET AL., *Petitioners,*

vs.

JOHN C. LONG, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of Missouri, Division No. 2.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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On Petition for Writ of Certiorari to the Supreme Court of Missouri, Division No. 2.

No. 177.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The petitioners in this action filed their petition for writ of certiorari in this Court on the 6th day of July, 1951, together with a certified typewritten transcript of that portion of the record in the Supreme Court of Missouri deemed pertinent by the petitioners, and also filed petitioners' motion to dispense with the printing of the record. On July 10, 1951, counsel for the petitioners served upon counsel for the respondents notice of the filing of the petition together with a copy of the petition and brief

in support thereof and a copy of the motion to dispense with the printing of the record.*

It is the contention of the respondents that the petitioners have not presented, and that the record in this case does not present, any adequate ground for the granting of the writ, and that the petition should therefore be denied.

Opinions Below.

No opinion was delivered by the Circuit Court of Jackson County, Missouri, at Kansas City, in which the case was tried. The judgment of the Circuit Court appears on pages 1071 to 1081 of the record. The opinion delivered by the Supreme Court of Missouri has not yet been officially reported, but is reported in 238 S. W. 2d 332. See also record, pages 1098 to 1114.

Jurisdiction.

The judgment of the Supreme Court of Missouri was entered against the petitioners on March 12, 1951 (R. 1097). The petitioners duly filed in that court a motion for a rehearing and a motion to transfer the cause to the Supreme Court of Missouri *en banc* (R. 1115), which motions were by the court denied on April 9, 1951 (R. 1131). The jurisdiction of this Court is invoked by the petitioners under Title 28, U. S. C., Section 1257 of the Judicial Code.

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*Counsel for the respondents have not been served with and have not been afforded the opportunity of examining a copy of the certified transcript of the record which was filed in this Court, but are informed by counsel for petitioners that the paging of that portion of said transcript consisting of the pleadings and evidence and proceedings in the trial court is the same as the paging of the transcript filed in the Supreme Court of Missouri (of which counsel for respondents have a copy), and that the record of proceedings in the Supreme Court follows thereafter in sequence. The numbers in parentheses in this brief are intended to refer to the pages of the certified transcript of the record filed in this Court in accordance with the information furnished in respect to the paging thereof.

STATEMENT.

There are certain inaccuracies in the petitioners' statement concerning some of the pertinent facts in the case and the issues involved, and it is therefore necessary for the respondents to present a short statement of the matters involved.

This action was originally instituted in the Circuit Court of Jackson County, Missouri, at Kansas City, on September 15, 1943, by 26 plaintiffs (21 of whom are now petitioners) and was brought in separate counts on behalf of each plaintiff to recover overtime compensation, liquidated damages and reasonable attorneys' fees "under and by virtue of the Statutes of the United States of America, and executive orders promulgated thereunder by the duly constituted and lawful authorities of the United States of America, and under agreements and contracts entered into by the defendants existing and in force at all times herein mentioned" (R. 3, 5).

There were subsequent amendments to the petition, and additional plaintiffs were included in separate counts added to the amended petition and supplements thereto (R. 33, 102, 176, and 207). The appeal to the Supreme Court of Missouri was taken by 114 out of 136 plaintiffs included in the original petition and the various amendments thereto.

The case was tried upon issues joined in the second amended petition for damages (R. 102) and supplements thereto (R. 176-207) and defendants' amended joint answer to the second amended petition of plaintiffs as amended by supplement (R. 193).

The case was tried upon the issues of whether the plaintiffs (petitioners herein) were entitled to recover from defendants (respondents herein) overtime compen-

sation, liquidated damages and attorneys' fees under the provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A., Sections 201-219).

The petitioners (plaintiffs below) are all former employees of the respondents (John C. Long and Robert W. Long, a partnership doing business as Long Construction Company, and Turner Construction Company, a corporation, sometimes herein referred to as the "defendants," or the "Contractor," or as "Long-Turner Construction Company"), and at the respective times of their employment by respondents, the petitioners were all engaged in original construction work in connection with the construction by respondents of a war plant in Jackson County, near Kansas City, Missouri.

The decision to acquire the site (about 400 acres) and construct this war plant for the manufacture of Pratt & Whitney aircraft engines was made by representatives of the Navy Department in the latter part of April, 1942, following the declaration of war in December, 1941 (R. 877).

It was then decided that the plant site should be acquired and the plant built and owned by Defense Plant Corporation, a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act (15 U. S. C. A., §601, *et seq.*), as amended, to aid the Government of the United States in its National Defense Program (54 U. S. Stat. 572). The Defense Plant Corporation was an agency of the United States Government (R. 877, 878).

It was further then decided that the plant should be operated for the United States Government under a contract between the United States Government (Navy Department), and a subsidiary corporation to be organized by United Aircraft Corporation, of East Hartford, Connecticut (R. 878).

Pursuant to these decisions, United Aircraft Corporation of Missouri was organized in June, 1942, under the Laws of Delaware, as a subsidiary of United Aircraft Corporation, for the sole purpose of carrying out the program decided upon by the Navy Department in April, 1942. In August, 1942, United Aircraft Corporation of Missouri (the subsidiary) was licensed to engage in business in Missouri, and shortly thereafter its corporate name was changed to Pratt & Whitney Aircraft Corporation of Missouri (R. 874, 875, 896).

These decisions made by the Navy Department in the latter part of April, 1942, were finalized into two separate and distinct agreements with separate agencies of the United States Government.

1. *Agreement of Lease.*

An Agreement of Lease, dated August 4, 1942 (defendants' Exhibit No. 168; R. 1035), was entered into between Defense Plant Corporation and Pratt & Whitney Aircraft Corporation of Missouri (then called United Aircraft Corporation of Missouri) whereby Defense Plant Corporation agreed to acquire the plant site, construct the plant building, install the machinery and lease the completed plant and machinery to Pratt & Whitney Aircraft Corporation of Missouri, for a rental of one dollar ($1.00) per year. The cost of the acquisition of the plant site, the cost of the construction of the plant building, and the cost of the installation of the machinery were all to be paid by Defense Plant Corporation, and title to the site, building, and machinery were vested in Defense Plant Corporation. Under this Agreement of Lease, Pratt & Whitney Aircraft Corporation of Missouri was required to proceed with the construction and equipment of the plant as "agent" and "acting for and on behalf of Defense Plant Corporation," and subject to its approval.

2. *Operating Agreement.*

An Operating Agreement, dated September 12, 1942, was entered into between the United States of America acting through the Navy Department, Pratt & Whitney Aircraft Corporation of Missouri, and United Aircraft Corporation, wherein Pratt & Whitney Aircraft Corporation of Missouri (the subsidiary) agreed to operate said plant and to manufacture and produce aircraft engines and parts exclusively for the United States Government. United Aircraft Corporation (the parent company) agreed to furnish management, engineering and production experience without compensation (R. 895). Said Operating Agreement provided in substance among other things (R. 896):

(a) That all materials, parts, equipment and other property required in the manufacture of Pratt & Whitney Aircraft engines and parts therefor should be purchased by Pratt & Whitney Aircraft Corporation of Missouri, as agent for the United States Government (Navy Department), and that the title thereto should pass to and vest in the Navy Department and not to or in Pratt & Whitney Aircraft Corporation of Missouri;

(b) That all monies necessary to provide working capital or otherwise to carry on the operation of said plant should be advanced by the Navy Department; and

(c) That neither Pratt & Whitney Aircraft Corporation of Missouri nor United Aircraft Corporation should profit directly or indirectly thereunder.

Plant Construction Contract.

In accordance with the decision made in the latter part of April, 1942, that said plant should be built and owned by Defense Plant Corporation (as said decision was finalized in the Agreement of Lease of August 4, 1942),

on July 6, 1942, Pratt & Whitney Aircraft Corporation of Missouri (then called United Aircraft Corporation of Missouri), as "Agent," and "acting for and on behalf of Defense Plant Corporation," entered into a contract with Long Construction Company and Turner Construction Company (the respondents herein and defendants below), as the "Contractor," for the construction of said plant for Defense Plant Corporation, as "Owner," on a cost-plus-a-fixed-fee basis (plaintiffs' Exhibit No. 132; R. 946).

Petitioners were all employed by the respondents (Long-Turner Construction Company) for the performance of work under the Construction Contract.

Under the terms of the Construction Contract, it was provided, among other things, in substance that Defense Plant Corporation should pay the construction costs (as therein defined), and should have a responsible field representative on the job, and that the title to all work completed, or in the course of construction at the site, and the title to all construction equipment, tools, materials, and supplies, the purchase price of which was chargeable to the cost of the work, should be in Defense Plant Corporation.

All of the petitioners (plaintiffs), including surveyors, firemen, guards, water boys, field cost clerks and a nurse were part of the construction gang. They were hired by and worked only for the construction Contractor (respondents).

The evidence shows that the construction of this plant by respondents was an undertaking of the United States Government. All purchase orders were issued for and on behalf of Defense Plant Corporation, all rental contracts for construction equipment were made on behalf of Defense Plant Corporation, and all incoming and outgoing shipments of materials and equipment were made by

Defense Plant Corporation (defendants' Exhibit No. 140; R. 973-976). The payroll account for this construction work was established by advances from the United States Treasury. All materials and equipment were paid for by check drawn on the Treasury of the United States (R. 960-968). All purchases and rentals were made by Defense Plant Corporation and paid for by checks drawn on the Treasury of the United States (R. 973-976).

The construction of the plant was entirely new and original construction. At the time of the beginning of the construction of the plant, the plant site was a cornfield with some brush, and just raw land for the most part, and it was the site of an abandoned race track (R. 983). The petitioners were all employed in this original construction work by the Contractor (Long-Turner Construction Company), some for a few weeks and some for a few months during various periods, none of said periods beginning earlier than in August, 1942, and none ending later than the early fall of 1943. The petitioners were all non-manual employees and they were employed and paid on a weekly wage or salary basis, as distinguished from manual employees (mechanics and laborers) who were paid on an hourly wage basis (R. 965-966).

Before the construction work began, early in August, 1942, the schedule of the weekly wages or salaries to be paid to non-manual employees of all classes was submitted to, and discussed with, representatives of Defense Plant Corporation by the Contractor (respondents herein), and was approved by Defense Plant Corporation (defendants' Exhibit No. 139; R. 963, 960, 965-970). The weekly salaries or wages were fixed upon the basis of a six-day work week, and if any of the non-manual employees in the plaintiffs' classifications worked on Sunday, they were paid one-sixth of the weekly salary for work on Sunday (R. 979). The Contractor (respondents)

discussed with representatives of Defense Plant Corporation and relied upon Interpretative Bulletin No. 5, issued by the United States Department of Labor, Wage and Hour Division (issued in December, 1938, and revised in October, 1940), to the effect that employees engaged in the original construction of buildings are not engaged in interstate commerce or in the production of goods for commerce and are not generally within the scope of the Fair Labor Standards Act (plaintiffs' Exhibit No. 135; R. 950, 970-973); and in reliance upon this ruling the salaries or wages of non-manual employees were fixed upon the basis of a six-day work week, regardless of the number of hours worked, and the plaintiffs were employed and paid on that basis (R. 965-973). All payrolls were submitted to, and audited (and sometimes pre-audited) and approved by Defense Plant Corporation (R. 965-970). Defense Plant Corporation maintained an engineering staff on the job (R. 985).

The petitioners generally testified that they were employed for a six-day work week of eight hours per day, and that their respective weekly salaries or wages were fixed on that basis. They do not contend that they were not paid the weekly wage or salary agreed upon when employed, but contend that they are covered by the Fair Labor Standards Act, and are entitled to overtime compensation for hours worked in excess of forty hours during any work week.

Defendants' Exhibits 141 to 165* were identified and briefly described by Mr. Long as found on pages 991 to 1006 of the record. These exhibits are photographs taken

*Defendants' Exhibits 141 to 165 apparently are not included in the certified transcript of the record filed in this case. However, they contain important and indisputable evidence of physical facts relating to the construction of the plant which was before the trial court and the Supreme Court of Missouri, and which would be essential in a consideration of the case by this Court if this Court should undertake to review the findings of fact by the trial court and by the Supreme Court of Missouri.

during the construction of the plant, and they give an excellent history of the progress of the work.

The surveyor petitioners (plaintiffs) were civil engineers. Their work was enormous in establishing lines, grades, elevations and doing other engineering in connection with the original construction of this tremendous war plant building and its auxiliary buildings covering 56 acres of ground and having about 86 acres (3,500,000 square feet) of floor space (R. 986). To establish that they were engaged in commerce, they rely in the main upon a claim of establishing line and grade on a little spur line of railroad into the plant. The photograph, Exhibit 159, taken March 12, 1943, shows the "beginning of some installation of railroad track" which was "only partially completed" (R. 1001) at that time. These petitioners (surveyors and engineers) seek to rely upon the relatively insignificant amount of work they performed in the construction of this small railroad spur (not yet completed) in support of their contention that they were engaged in commerce, but without making any distinction as to whether their work was performed before or after the track was put into operation. The progress of the spur is shown in Exhibits 161 taken March 19, 1943 (R. 1002, 1003), and 162 taken as late as April 2, 1943 (R. 1004). The track apparently had not been completed at the latter date. Counsel for petitioners are in error when they state on page 5 of the statement in their petition that the spur line was in operation thirty days after August 3, 1942, and that it remained in use constantly thereafter.

In their statement included in the petition for writ of certiorari, the petitioners state that: "The facts are practically undisputed" (petition, page 4); but the decision of the Supreme Court of Missouri and the record

will show that many of the statements of the facts by petitioners are not only disputed, but incorrect.

For example: The petitioners, in describing the work performed by the surveyors, state (petition, page 5):

> "It took approximately thirty days from August 3, 1942, to get the spur line in operation, after which it was in constant use (272). * * * The evidence of the surveyors showed that without exception in the months following August 3, 1942, a substantial portion of each and every work week was devoted to the aforesaid instrumentalities of interstate commerce (279-280-331)."

The Supreme Court of Missouri, however, found the facts to be as follows (238 S. W. 2d 341; R. 1111-1112):

> "The substantial evidence is that it (the spur track) had not been temporarily laid until the latter part of March, 1943, or perhaps as late as May, 1943. The surveyors did not work on the switch tracks every week. There is no definite evidence when they worked on the main switch after cars moved over it or when it was placed in final position. They were unable to give any dates when they worked on it." (Parentheses supplied.)

The physical facts as shown by the photographs (defendants' Exhibits 141 to 165; R. 951-1006) taken during the progress of the work demonstrate the correctness of the findings of the Missouri Supreme Court; and demonstrate conclusively that the spur track was not in operation at the times claimed by petitioners.

The petitioners' principal surveyor witness Shrewsberry testified (R. 290) that he did not have "any dates as to when he worked on those railroad tracks"; and that (R. 290) he could not "inform the court" when he

"worked on them." Other witnesses of petitioners testified to the same effect (R. 323).

In the case of the guards and the firemen, they were likewise employed in the original construction work. The guards were engaged in the protection of a plant building under construction covering 56 acres of ground, and of the plant premises covering some 400 acres of ground. These guards patrolled the premises, directed traffic at the various entrance gates, checked persons entering and leaving the premises, prevented gambling, drinking and fighting by employees on the premises, and generally performed the duties of guards in order to safeguard the property which was being constructed for war purposes (see findings of Supreme Court of Missouri, 238 S. W. 2d 337, 338; R. 1105).

The same is generally true in the case of the firemen who were engaged in patrolling the building which was in process of construction in order to prevent fires and put out fires when they occurred. The duties of the firemen required them to safeguard particularly against fires which might result from the use of coke burning salamanders which might set fire to the wooden forms which were used in the concrete construction of the building, and to perform other similar services (see findings of Missouri Supreme Court, 238 S. W. 2d 337, 338; R. 1105).

Counsel for petitioners seem to contend that there was some relationship between the employment of petitioners (plaintiffs) by respondents (defendants) in the construction of the plant, and the manufacturing operations of Pratt & Whitney Aircraft Corporation of Missouri under its Operating Agreement with the Navy Department. The petitioners (plaintiffs) were not employed by Pratt & Whitney Aircraft Corporation of Missouri, and they had no relationship whatever with its manufacturing operations. These manufacturing operations were performed

by Pratt & Whitney Aircraft Corporation under its Operating Agreement with the Navy Department, which was entirely separate from the Construction Contract entered into with the respondents (defendants) on behalf of Defense Plant Corporation (R. 895).

The manufacturing operations were governmental in their nature and scope. Pratt & Whitney Aircraft Corporation of Missouri furnished the management, engineering skill, and experience, and the "know-how," without compensation to it; and the United States Government advanced the entire cost; all materials, parts, supplies and equipment were purchased by Pratt & Whitney Aircraft Corporation of Missouri, as agent for the United States Government (Navy Department); all incoming and outgoing shipments were made by the United States Government; and the title to all finished products was vested in the United States Government (defendants' Exhibit No. 169; R. 896, 1041).

Throughout the entire time that Pratt & Whitney Aircraft Corporation of Missouri was engaged in operating the engine plant, there were present representatives of the Contracting Officer of the Bureau of Aeronautics of the Navy Department, including a very large staff of Navy officers and other experts, and all completed parts and all completed engines that were manufactured at the plant were inspected by representatives of the Contracting Officer of the Navy Department at the plant, and were accepted by the Navy Department at the plant before being shipped from the plant (R. 1042, 1043). There was obviously no relationship between the construction employees of the respondents (defendants) and the manufacturing operations of Pratt & Whitney Aircraft Corporation of Missouri.

The facts are that the construction work progressed from the west end of the building, and that as a section

was completed it was released to Pratt & Whitney, wooden partitions were constructed around the space released, the Long-Turner guards and firemen were moved back and had no jurisdiction thereover (R. 540-542, 632; see also Missouri Supreme Court decision, 238 S. W. 2d 338, 339; R. 1106, 1108). No manufacturing operations were begun until May or June, 1943 (R. 632; see also Missouri Supreme Court decision, 238 S. W. 2d 338; R. 1106). There is no evidence that any of the employees of Long-Turner performed any duties necessary to the production of goods for commerce by Pratt & Whitney during any work week of their respective periods of employment (see decision of Missouri Supreme Court, 238 S. W. 2d 339; R. 1108).

Following the cessation of hostilities in August, 1945, Pratt & Whitney Aircraft Corporation of Missouri discontinued the operation of the plant and, effective October, 1945, Reconstruction Finance Corporation* (successor in interest to Defense Plant Corporation), as owner of the plant, terminated the Agreement of Lease of August 4, 1942 (R. 1037, 1038). It is a matter of public record that in 1948 this plant was transferred from Reconstruction Finance Corporation to the United States of America (Department of the Navy) and designated as a Naval Industrial Reserve Plant.

*Under the provisions of Public Law 109, 79th Congress (59 U. S. Stat. 310), effective July 1, 1945, Defense Plant Corporation was dissolved, and all of its functions, powers, duties, and authority, together with its documents, books of account, records, assets and liabilities of every kind and nature were transferred to Reconstruction Finance Corporation (R. 1037).

The Judgment of the Trial Court.

At the close of the evidence at the trial of the case, the trial court made and gave, among others, the following findings of fact:

> "(1) Defendants were, at all times mentioned in plaintiffs' petition, engaged in the original construction of a war plant on a site provided by Defense Plant Corporation, a corporation created by Reconstruction Finance Corporation pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, as amended, to aid the Government of the United States in its National Defense Program" (R. 1065).
>
> "(2) The construction work was performed under a contract dated July 6, 1942, by and between defendants and United Aircraft Corporation of Missouri (the corporate name of which has been changed to Pratt & Whitney Aircraft Corporation of Missouri), acting for and on behalf of Defense Plant Corporation on a cost-plus-a-fixed-fee basis" (R. 1065).
>
> * * * * * *
>
> "(8) Plaintiffs did not receive or unload incoming materials, and the services they performed did not constitute actual participation in commerce, or in work so closely related to the movement of interstate commerce as to be a part of it" (R. 1067).

And the trial court made and gave, among others, the following conclusions of law:

> "(1) Plaintiffs were not, during any work week while employed by defendants, engaged in commerce within the meaning of the Fair Labor Standards Act of 1938" (R. 1069).
>
> "(2) Plaintiffs were not, during any work week while employed by the defendants, engaged in the production of goods for commerce within the mean-

ing of the Fair Labor Standards Act of 1938" (R. 1069).

The judgment of the trial court in favor of the defendants (respondents) and against the plaintiffs (petitioners) was based upon the grounds that (a) "None of said plaintiffs was, during any work week while employed by the defendants, engaged in commerce within the meaning of the Fair Labor Standards Act of 1938"; and that (b) "None of said plaintiffs was, during any work week while employed by the defendants, engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938" (R. 1074).

The Decision of the Supreme Court of Missouri.

After a careful review of the case "upon both the law and the evidence" as required under the Missouri Statutes [Missouri Revised Statutes 1949, Sec. 510.310(4)], the Missouri Supreme Court affirmed the findings of fact and conclusions of law and the judgment of the trial court. The statute last above referred to provides that "The judgment shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Reference to the decision of the Supreme Court of Missouri (*Hartmaier, et al.*, v. *Long, et al.*, 238 S. W. 2d 332; R. 1098-1114) will demonstrate that the rulings of the Supreme Court of Missouri are entirely consistent and in conformity with the decisions of this Court and the leading decisions of the United States Courts of Appeals relating to the interpretation of the Fair Labor Standards Act, as applied to the facts found by the trial

court, and more fully reviewed, analyzed and found by the Supreme Court of Missouri.

The petitioners nowhere seem to complain of the decision of the Supreme Court of Missouri in its interpretation of the Act and of the decisions of this Court and of the Courts of Appeals relating to the Act, *as applied to the facts as found by the Supreme Court of Missouri.*

The petitioners' complaint seems to be that the Supreme Court did not find the facts differently so as to produce a different result.

Questions Presented.

The questions which petitioners have undertaken to present for the consideration of this Court are stated by them as follows (petition for writ of certiorari, pages 7-8):

I.

Petitioners firemen and guards were covered by the Fair Labor Standards Act because the protective activities of the firemen and guards were so closely related to incoming interstate shipments as to be a part thereof.

II.

Plaintiff firemen, guards and waterboys after February 1, 1943 (the date on which machinery for Pratt & Whitney operation arrived and was set up), were rendering such necessary and essential services as to constitute "production of goods" and thus they were protected by the Act. Moreover, plaintiff firemen and guards were still covered under Point I, *supra,* because the protective duties of the firemen and guards were still so closely related to incoming interstate shipments as to be a part thereof.

III.

The surveyors were covered by the Fair Labor Standards Act for the reason that when they were engaged in laying out and moving railroad tracks and spurs over which interstate commerce flowed from the time the tracks were first temporarily laid, they were working up and reconstructing instrumentalities of interstate commerce.

The foregoing questions presented by petitioners do not specify any ruling of the Supreme Court of Missouri in this case which it is contended is in conflict with any decision of this Court or with any decision of any of the Courts of Appeals relating to the interpretation and ap-

plication of the Fair Labor Standards Act, nor do they specify any respect in which it is contended that the Supreme Court of Missouri has decided the case "in a way probably not in accord with applicable decisions of this Court" [Supreme Court Rule 38, paragraph 5(a)].

The petition states generally that "the judgment of the Supreme Court of Missouri completely ignores and is in conflict with applicable Federal cases from the various Courts of Appeals of the United States, and is likewise in conflict with controlling decisions of this Court" (petition for writ of certiorari, page 2); but nowhere in the petition, nor in the questions presented, nor in the brief in support of the petition, do we find any specification of any ruling in the decision of the Supreme Court of Missouri which it is contended is in conflict with any decision of this Court, or any decision of any of the United States Courts of Appeals.

It appears that the questions which petitioners have undertaken to present consist of nothing more nor less than "an invitation" to this Court "to try the case *de novo.*" The following language used by this Court in the case of *Timken Roller Bearing Co.* v. *United States,* 71 S. Ct. 971, 974, seems to be pertinent:

> "For the most part this shotgun approach is actually only a dispute as to the proper inferences to be drawn from the evidence in the record; in effect, it is an invitation for us to try the case *de novo.* This Court must decline such an invitation just as it does when the Government makes the same request. *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150."

We submit that the questions sought to be presented by petitioners are not of such a character as to require the consideration of this Court [Supreme Court Rule 38, paragraph 5(a)].

ARGUMENT.

We submit that the opinion delivered by the Supreme Court of Missouri in this case (238 S. W. 2d 332; R. 1098-1114) is a very carefully prepared opinion, and that the conclusions reached therein are in full accord with the decisions of this Court and of the United States Courts of Appeals relating to the interpretation and application of the Federal Fair Labor Standards Act. The petitioners fail to point out any ruling in the decision of the Supreme Court of Missouri which they claim is in conflict with any decision of this Court or with any of the leading decisions of the Courts of Appeals. Apparently their chief complaint is that the findings of fact by the trial court and by the Supreme Court of Missouri are not all in accordance with their interpretations of the evidence. No "special and important reasons" (Rule 38, Paragraph 5) are presented which require this Court to take jurisdiction and to "try the case *de novo.*"

It would seem that no argument is required in opposition to the granting of the writ other than to refer to the very able opinion of the Supreme Court of Missouri. It is worthy of note that the Supreme Court of Missouri reaches the same conclusion as did the Kansas City Court of Appeals in a similar suit brought by a fellow employee of petitioners against these respondents involving work performed in the construction of the very plant at which the petitioners were working (*Adams* v. *Long, et al.*, 239 Mo. App. 1227, 202 S. W. 2d 112).

Referring specifically to the points presented in the petitioners' brief, we submit the following:

I.

The petitioners firemen and guards were employed in the original or new construction of a plant building and were not, during any work week while employed by respondents, engaged in work so closely related to the movement of commerce (the movement of materials across state lines) as to be a part of it, and therefore to be "engaged in commerce" within the meaning of the Fair Labor Standards Act.

There is no question that the firemen and guards, as well as all of the other petitioners, during all of the time they were employed by the defendants, were engaged in original construction work.

The Supreme Court of Missouri in its decision in this case, held (238 S. W. 2d 336; R. 1103):

> "It is well settled that employees engaged in original construction are not within the Act even though the building or facility will be used for purposes within the Act upon completion."

This ruling is in accord with the decisions of this Court and of the United States Courts of Appeals.

Murphey, et al. v. *Reed, et al.*, 335 U. S. 865, 69 S. Ct. 105.

McDaniel, et al. v. *Brown & Root, Inc., et al.* (10 Cir.), 172 F. 2d 466, 471.

Noonan v. *Fruco Construction Co.* (8 Cir.), 140 F. 2d 633.

Parham, et al. v. *Austin Company* (5 Cir.), 158 F. 2d 566.

Scholl v. *McWilliams Dredging Company, et al.* (2 Cir.), 169 F. 2d 729.

See also *Cooper* v. *Rust Engineering Company* (6 Cir.), 181 F. 2d 107, and opinion on Petition for Rehearing reported in 9 W. H. Cases 506, 18 CCH Labor Cases, page 78166, ¶65952; Certiorari denied 71 S. Ct. 116.

See also *Adams* v. *Long*, 239 Mo. App. 1227, 202 S. W. 2d 112.

In the administrative interpretation of the Act by the Wage and Hour Division of the United States Department of Labor, Interpretative Bulletin No. 5 (paragraph 12) issued in October, 1940 (1944-45 WH Manual 18, 23), it is provided as follows (R. 970):

> "The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. There may be particular employees of such construction contractors, however, who engage in the interstate transportation of materials or other forms of interstate commerce and are for that reason entitled to the benefits of the Act."

This administrative interpretation of the Act has been generally approved and accepted by the courts (see *Parham, et al.* v. *Austin Company,* 158 F. 2d 566, 568; *Noonan* v. *Fruco Construction Co.,* 140 F. 2d 633, 635).

The decision of the Supreme Court of Missouri is therefore not only in accord with the decisions of this Court and of the Courts of Appeal but is in accord with the administrative interpretation of the Act by the Wage and Hour Division of the United States Department of Labor.

There is no evidence that any of the petitioners were engaged in any work during any work week relating directly to the transportation of materials across State lines so as to bring them within the exception to the general rule. The Supreme Court of Missouri in its opinion in this case held that (238 S. W. 2d 338; R. 1107):

> "The evidence did not establish that the guards and firemen, or any guard or fireman, devoted a sub-

stantial portion of any given work week to services within the Act. The record sustains the trial court. Consult *Reed* v. *Murphey* (5 Cir.), 168 F. 2d 257, 260; *Cooper* v. *Rust Engineering Co.* (W. D. Ky.), 85 F. Supp. 149, 150; *Parham* v. *Austin Company* (5 Cir.), 158 F. 2d 566, 567."

There is therefore no basis for the contention of the petitioners that the firemen and guards were covered by the Act on the ground that their duties were so closely related to incoming interstate shipments as to be a part thereof.

II.

There is no basis for petitioners' contention that the firemen and guards were covered because their work was necessary to the production of goods for commerce, or that the water boys were covered for the same reason.

Notwithstanding that the petitioners were all engaged in the original construction of buildings, it is contended by petitioners that some of them were engaged at some time in the performance of work necessary to the production of goods for commerce because of the fact that Pratt & Whitney Aircraft Corporation of Missouri engaged in some processing of some engine parts at the plant after May or June, 1943, in preparation for the manufacture of aircraft engines.

In reference to this contention, the Supreme Court of Missouri in its decision in this case, found and held (232 S. W. 2d 339; R. 1108):

"The services rendered by plaintiffs were essential to the original construction work of Long-Turner, a local transaction; but they were not established by the evidence to be the foundation of or to have such a close and immediate tie with the production of goods for commerce by Pratt & Whitney as to be an essential part of it."

And the Supreme Court of Missouri in its decision further held (238 S. W. 2d 339, 340; R. 1109):

> "Furthermore, the evidence does not establish that any specific fireman, guard, waterboy or the nurse engaged in the production of goods for commerce for any substantial period of any given work week; and it is impossible to say that any plaintiff performed such work within any given work week and, if so, whether he worked in excess of forty hours that particular week. We do not find sufficient evidence for overturning the court's refusal of plaintiffs' findings of fact and conclusions of law in this respect."

The first aircraft engine was not completed and delivered until December 30, 1943. The employment of many of the petitioners expired before May, 1943, but even as to the petitioners who were employed after that time, the facts do not support this contention.

It appears from the evidence that the construction of the factory building was begun from the westerly end and extended towards the east (R. 1007); and as portions of the factory building were completed at the westerly end, these portions were released by the contractor (respondents) to Pratt & Whitney Aircraft Corporation of Missouri, and that Corporation moved into the completed portions of the structure in order to prepare for its manufacturing operations (R. 1007). The petitioners who were employees of the respondents were excluded from the portions of the building taken over by Pratt & Whitney (R. 540, 542, 584). The employees of respondents would "move on out as they took over a section of the building" (R. 413), and the completed portions were fenced off and the petitioners (employees of respondents) "had no right whatsoever inside of there" (R. 541).

The fact that the petitioners (employees of respondents) were engaged in original construction work only and that they were specifically excluded from the portions of the building taken over by Pratt & Whitney and had no jurisdiction whatsoever in the part so taken over, would seem to be sufficient to demonstrate that they were not engaged in the performance of any duties "necessary to the production" of goods in commerce [29 U. S. C. A. Sec. 203(j)]. The evidence which the petitioners claim to be in support of this contention is extremely general, vague, and inconclusive and falls far short of discharging the burden of proof which rested upon the respective petitioners (plaintiffs below) to establish that they or any of them were engaged in the performance of work necessary to the production of goods for commerce during any specific work week of their employment.

Schwarz v. *Witwer Grocer Co.* (8 Cir.), 141 F. 2d 341, 343, 344; certiorari denied, 322 U. S. 753, 64 S. Ct. 1265.

Same case, 49 F. Supp. 1003, 1004.

Maitrejean v. *Metcalfe Construction Co.* (8 Cir.), 165 F. 2d 571, 574.

Englert v. *S. Birch & Sons Const. Co.* (9 Cir.), 163 F. 2d 34, 37; certiorari denied, 332 U. S. 816, 68 S. Ct. 154.

Jax Beer Co. v. *Redfern* (5 Cir.), 124 F. 2d 172, 175.

The ruling of the Supreme Court of Missouri is in accord with the rulings of this Court and of the United States Courts of Appeals.

Scholl v. *McWilliams Dredging Co.* (2 Cir.), 169 F. 2d 729, 732.

Kelly v. *Ford, Bacon & Davis, Inc.* (3 Cir.), 162 F. 2d 555.

See also *McLeod* v. *Threlkeld*, 319 U. S. 491, 63 S. Ct. 1248.

The conclusion reached by the Supreme Court of Missouri is also in accordance with the administrative rulings of the Wage and Hour Division of the Department of Labor. The following opinion given by an Assistant Solicitor of the Wage and Hour Division of the Department of Labor, is in point (Wage and Hour Manual, 1944-1945, page 93):

> "Question: Our company is engaged in constructing a building in which we shall produce goods for interstate commerce. The building is now half completed and productive operations have begun. The completion of the building, therefore, is proceeding at the same time that productive operations are being conducted. Are employees engaged in construction of the building covered by the Fair Labor Standards Act?
>
> "Answer (Assistant Solicitor in Charge of Opinions): It would appear to us that notwithstanding the fact that the employees concerned are building a building which is presently engaged in the production of goods for commerce, their activities would come within the category of original construction, and therefore not within the purview of the Act."

There is therefore no basis for the contention of petitioners that some of them were engaged in work necessary to the production of goods for commerce after portions of the building were taken over by Pratt & Whitney Aircraft Corporation of Missouri.

III.

There is no basis for the contention of petitioners that the surveyors were covered because when they were working upon the sidings connected with the railroad tracks, they were working upon instrumentalities of interstate commerce.

The Supreme Court of Missouri in its decision relating to this contention, found and held (238 S. W. 2d 340, 341; R. 1111, 1112):

> "The several switch tracks within the plant area, totaling approximately 2.06 miles, connected with the main line of the Missouri Pacific, an interestate railroad, east of the plant. The main switch track was to pass around the north end of the main building to the receiving dock on the west side of the building. It was necessary to excavate part of a cliff at the northeast part of the area to make space for this track north of the building. The evidence was that after this switch had been temporarily laid to the receiving dock, engines and freight cars used it; and thereafter the track, after the cliff was cut farther back, was moved farther north to get it in final position. The surveying party which located this switch would relocate it along the excavation and laborers, using a bulldozer, would move 50 feet of the track at a time.
>
> "The substantial evidence is that it had not been temporarily laid until the latter part of March, 1943, or perhaps as late as May, 1943. The surveyors did not work on the switch tracks every week. There is no definite evidence when they worked on the main switch after cars moved over it or when it was placed in final position. They were unable to give any dates when they worked on it.
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> • • • • • • •
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> "The services of the surveyors connected with the new construction of buildings, roads, docks, power and communication facilities, railroad spurs et cetera were not within the Act. See *Reed* v. *Murphey,* and other cases, notes 8, 9, *supra; Brue* v. *J. Rich Steers,*

Inc., D. C. S. D. N. Y., 60 F. Supp. 668, 669[3]; *Barbe* v. *Cummins Const. Co.*, D. C. Md., 49 F. Supp. 168, affirmed, 4 Cir., 138 F. 2d 667."

Counsel for petitioners in their brief in support of this contention, completely fail to distinguish between work which is performed in the original construction of a facility which later may be used in interstate commerce, and work which is performed in the repair or rehabilitation of an instrumentality which is already dedicated to use in interstate commerce.

In this case there was no convincing evidence that any of the surveyors were engaged in work upon the switch tracks during any specific work week after the switch tracks had been dedicated for use in interstate commerce. A very large portion of the work of the surveyors was in connection with the laying out of the lines for the huge building structure, and work done in connection with the switch tracks was infinitesimal as compared with the principal work which they were performing. There is no satisfactory evidence concerning when the switch track was actually put in use or that any of the petitioners (plaintiffs) performed work thereon after it was so put in use. In these circumstances the ruling and decision of the Supreme Court of Missouri is in accord with the rulings of this Court and of the United States Courts of Appeals. *Nieves, et al.* v. *Standard Dredging Corporation* (1 Cir.), 152 F. 2d 719; *Scholl* v. *McWilliams Dredging Co.* (2 Cir.), 169 F. 2d 729; *Kelly* v. *Ford, Bacon & Davis* (3 Cir.), 162 F. 2d 555.

There is, therefore, no basis for the contention of petitioners that those of them who were surveyors are covered by the Act because of the performance of some work by them upon the switch track while in process of construction.

We respectfully submit that the petitioners have completely failed to present any convincing reason why this Court, in the exercise of a sound judicial discretion, should allow a review of the decision and judgment of the Supreme Court of Missouri in this action, and that the writ should therefore be denied.

Respectfully submitted,

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